UNILATERAL IMPOSITION OF SANCTIONS THROUGH EXTRA-TERRITORIAL APPLICATION OF DOMESTIC LAWS : A TALE OF TWO US STATUTES

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"[A] State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject."

Judge John B. Moore (US)[1]

1. A DOCTRINAL PERSPECTIVE

A sovereign state's competence to make laws and enforce them is derived from its authority over its *domaine reservé* as recognized by international law. Resort to this competence being unilateral, its external validity depends on its conformity with international law. In the *Anglo-Norwegian Fisheries* case, the International Court held that where a unilateral act of a state (such as the adoption of a piece of domestic legislation establishing a coastal fishing zone) has an "international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law"; its validity with regard to other states depends upon international law.[2] In Judge Moore's words, "the exercise of national jurisdiction is limited by the mutual obligations of States under the law of Nations".[3] The *Fisheries* rule implies that a state has a burden to prove that its acts on the international plane do not run counter to international community interests or international law. It is against this perspective that one considers the issue of conformity of two of the recent US statutes with international law.

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This is a revised version of a paper entitled "Unilateral Sanctions and Extra-territoriality of Domestic Laws: A Perspective of Public International Law" presented at a seminar jointly organized by the Government of the Islamic Republic of Iran and the Asian-African Legal Consultative Committee at Tehran, 24-25 January 1998.

1. *The Lotus case, PCIJ, Series A, No. 10,* p.93.
2. *ICJ Reports 1951,* p. 132.
3. Note 1, p.67. In the *Lotus* case, the Permanent Court of International Justice did say that "Restrictions on independence of States cannot be presumed". But the Court was merely stressing the need for evidence of both permissive and prohibitionary rules to determine the international validity of an act of a state, rather than emphasising the absolutist interpretation of freedom of action on the part of a state. This is evident from the Court's emphasis on the territorial limitation of a state's jurisdiction. See *ibid.*, pp.18-19.

A formal distinction is often made between prescriptive jurisdiction and enforcement jurisdiction of a state; it is argued that mere adoption of a law, as opposed to some action taken thereunder, does not amount to a violation of international law. Where the international validity of an act of a state is at issue, the relevant question is whether the impugned act attributable to any organ or agency of the state constitutes a violation of international law. A national legislature is not *per se* incapable of violating or authorising violation of international law. A piece of legislation seeks to provide a legal framework for institutional action; it requires and mandates action by state instrumentalities. In terms of the law of reparation, the distinction between perscriptive and enforcement jurisdictions may not be material for at least two reasons. First, as was held in the *Chorzow Factory (Merits)* case, the very concept of reparation should, "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[4] It should wipe out the very source of illegality, even if it is only a piece of legislation mandating such an act. Second, a piece of legislation, authorizing or requiring a strong executive action may cause injury to a party which is potentially targeted by the very threat of such action — as is the case with the threat of economic sanctions. Indeed, the fact of injury is a matter of proof.

II. THE US EXTRA-TERRITORIAL LAWS

The United States must perhaps be credited with the distinction of perfecting the 'art' of unilateral sanctions on the international plane through the instrumentality of its domestic laws.[5] Indeed, this trend gathered momentum with the Cold War, aimed at economic sanctions directed against the countries of or dealing with the former Soviet bloc. "Through a variety of legislative and statutory provisions, the United States has mastered the art of economic coercion and instituionalized retorsion as a system of first- and second- order compliance with [the American perception of] international law."[6] The extra-territorial application of many of these American municipal laws is often sought to be justified in terms of the security of the United States, horizontal non-proliferation of nuclear weapons and other weapons of mass destruction, promotion of human rights, propogation of free trade and of the western brand of democracy, and other objectives of the US foreign policy.

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4. *PCIJ, Series A, No. 13*, p. 47.
5. See Roger Fischer, *Improving Compliance with International Law* (Charlottesville, Va., 1981).
6. Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Counter-Measures* (Dobbs Ferry, NY, 1984), p.8.

As the US transnational corporations became increasingly globalised since the end of the Second World War, it became necessary for the United States to seek to make them accountable to American laws. Hence the extra-territorial application of the US anti-trust and revenue laws. The US anti-trust laws proved highly controversial with European nations, as they were based on an untenable extension of the principles of territoriality and nationality for exercise of state jurisdiction pegged on the "effects" doctrine.[7]

The Western concern to restrict access to benefits of high technology and preserve military superiority in nuclear and space armaments and their delivery systems led to the evolution of high technology oligopolies like the Missile Technology Control Regime (MTCR). The United States was ready with a municipal law to declare invalid MTCR relevant high technology transfers even if sought to be effected between foreign countries, completely outside the territorial jurisdiction of the United States.[8]

The present focus is, however, on two recent US statutes, (a) the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act,[9] and (b) the Iran and Libya Sanctions Act.[10]

A. LIBERTAD ACT

The objective of the LIBERTAD Act is "to seek international sanction against the Castro government of Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba, and for other purposes".[11] The Act is in four parts. The first part on "strengthening international sanctions against the Castro government" provides, *inter alia,* for enforcement of the economic embargo of Cuba, prohibition of indirect financing of Cuba, US opposition to Cuban membership in international financial institutions, continuation of suspension of Cuban participation in

7. For an early assertion of "long arm" jurisdiction based on this doctrine, see *US vs. Aluminium Company of America,* 148F 2d 416 (1945), generally known as the *Alco* case.

8. On this see V.S. Mani "Transfer of Space Technology, MTCR, National Security and Space Oligopoly: A Study of the Recent Indo-Russian Experience" in V.S. Mani, S. Bhatt, and V.B. Reddy (eds), *Recent Trends in International Space Law and Policy* (New Delhi, 1997), pp.549-575.

9. 22 USC 6021, *ILM,* vol. 35 (1996), pp. 357-40, also Known as Helms-Burton Act.

10. 50 USC 1701, *ILM,* vol. 35 (1996), pp. 1273-1279. Also known as the D'Amato Act, or the Kennedy-D'Amato Act. For some of the recent comments on these two US. enactments, see, A Lowenfeld, "Congress and Cuba: The Helms-Burton Act" *AJIL,* vol. 90 (1996), pp. 419-440; B.M. Clagett, "A Reply to Professor Lowenfeld", *ibid.* pp. 641-644. Helms-Burton and D'Amato Acts", *ICLQ*, vol. 46 (1997), pp.378-390, B. Stern, "Can the United States Set Rules for the World? A French View," *Journal of World Trade,* vol. 31 (1997), pp.1-26.

11. The Preamble to the LIBERTAD Act, note 9.

OAS, withholding of assistance to CIS states which assist Cuba, television broadcasting to Cuba, authorization of support for democratic and human rights groups, withholding of foreign assistance from countries supporting nuclear plants in Cuba, extradition of Cuban nationals required in criminal proceedings in the US, and condemnation of Cuban attack on American aircraft. The second part of the Act provides for a policy towards a transitional and a democratic government in Cuba. The third part is on protection of property rights of the US nationals including prohibition of "trafficking" in confiscated property claimed by the US nationals. The final part provides for exclusion from the US of aliens who have or who traffic in the confiscated property of the US nationals. The Act is prompted by the judgments ("Findings") of the US Congress on the substantial decline of the Cuban economy and the reasons therefor, on the undemocratic and totalitarian nature of the Cuban government and political system, on the need to subject the trade of other countries with Cuba to the requirement of democratisation of Cuba, on Cuban government participation in illegal international drug trade and harbouring of fugitives from American justice, on the Cuban conduct threatening international peace and security by engaging in acts of armed subversion and terrorism, on Cuban violation of the law of asylum and human rights, on the Cuban government blackmail of the US and other governments in violation of the OAS Charter and other agreements and international law.[12] One of the "purposes" of the Act is "to provide for the continued national security of the United States in the face of continuing threats from the Castro government".[13]

An interesting provision of the Act is a conclusion that "(A) the completion and operation of any nuclear power facility, or (B) any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States will be considered an act of aggression which will be met with appropriate response"[14]

B. IRAN-LIBYA SANCTIONS ACT

The Iran and Libya Sanctions Act, 1996 seeks "to impose sanctions on persons making certain investments directly and significantly contributing to the enactment of the ability of Iran or Libya to develop its petroleum resources, and on persons, exporting certain items that enhance Libya's weapons or aviation capabilities or enhance Libya's ability to develop its petroleum resources and for other purposes".[15] The Act is prompted by a

12. Section 2 of the Act, *ibid.*
13. Section 3 of the Act, *ibid.*
14. Section 101 of the Act, *ibid.*
15. Preamble to the Act, note 10.

series of Congressional "Findings": (1) That the efforts of Iran to acquire weapons of mass destruction and delivery systems and its support to international terrorism endanger the national security and foreign policy interests of the United States and of those countries with which the United States shares common strategic and foreign policy objectives", (2) That prevention of the proliferation of weapons of mass destruction and acts of international terrorisms require denial of financial means to Iran to sustain its weapons programmes, (3) That Iran is using diplomatic and quasi-governmental facilities abroad to promote acts of international terrorism and its weapons programmes, and (4) That the failure by Libya to comply with the 1992 and 1993 resolutions of the UN Security Council, its support to international terrorism, and its efforts to acquire weapons of mass destruction, all constitute a threat to international peace and security "that endangers the national security and foreign policy interests of the United States and those countries with which it shares common strategic and foreign policy objectives."[16]

The Iran-Libya Sanctions Act envisages establishment of a multilateral sanctions regime against Iran, both through international fora such as the UN, as well as through a bilateral network with US allies.[17] It requires the US President to impose sanctions against any person (including a foreign person) whose investment amounts to or exceed $ 40,000,000 in any 12-month period "directly and substantially contributed to the enhancement of Iran's ability to develop petroleum resources of Iran," and against any person (including a foreign person) who has transported goods, services and technology to Libya in violation of the Security Council resolutions, if provision of such items significantly contributed to the enhancement of Libya's ability to acquire advanced weapons systems, to maintain its aviation capabilities, or its ability to develop petroleum resources.[18] The President is not, however, required to apply the sanctions, where goods or services are "essential to the national security", or "essential to the United States products or production" or for "humanitarian" purposes.[19]

III. ISSUES OF LEGALITY

The international legality of enforcement of the two 1996 US enactments may be examined at three, albeit, mutually related, levels; (a) the peremptory norms of international law, (b) the law relating to peacetime counter-measures, and (c) unilateral imposition of 'international' sanctions.

16. Section 2 of the Act, *ibid.*
17. Section 4 of the Act, *ibid.*
18. Section 5(a) (b) of the Act, *ibid.*
19. Section 5 (f) of the Act, *ibid.*

A. Peremptory Norms of International Law[20]

A little over three months before the adoption of the Helms-Burton Act, the UN General Assembly adopted Resolution 50/10 on 2 November 1995, reaffirming the principles of sovereign equality of states, non-intervention, and freedom of international trade and navigation, underscoring "the need to eliminate the unilateral application of economic and trade measures by one State against another which affect the free flow of international trade", and "concerned about the continuous promulgation and application by Member States of laws and regulations whose extra-territorial effects, affect the sovereignty of other States and the legitimate interests of entities or persons under their jurisdiction, as well as the freedom of trade and navigation".

The European Union's protests against the LIBERTAD Act of 5 March 1996,[21] *inter alia*, stated that EU "cannot accept that the US unilaterally determine and restrict EU economic and commercial relations with third countries." It reiterated that "the United States has no basis in international law to claim the right to regulate in any way transactions taking place outside the United States with Cuba undertaken by subsidiaries of the US companies incorparated outside the US". It pointed out that the provisions of the Act "would appear to violate the general principles of international law and sovereignty of independent states". The question of its compatibility with WTO rules was also raised.

The opinion of the inter-American Juridical Committee dated 23 August 1996 in response to Resolution AG/DOC 337/96 of the OAS General Assembly expounded a range of international law rules and concluded that "the bases and potential application of the legislation (Helms-Burton Act) ... are not in conformity with international law".[22] These rules indicated the limits of protection of property rights of nationals and extra-territoriality of national laws.

The international debate has raised a number of legal issues relevant to the validity of the Helms-Burton Act and the D 'Amato Act, Most of these constitute ramifications of four peremptory norms of international law, namely, sovereign equality, non-intervention, good faith and freedom of trade.

1. Sovereign Equality

The 1970 Declaration on Friendly Relations provides:

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20. See generally AALCC, *Extra-Territorial Application of National Legislation: Sanctions Imposed against Third Parties: Note of the Secretary-General*, Doc. AALCC/XXXVI/TEHRAN/97 S.8, V.S. Mani, note 8.
21. See *ILM*, vol.35 (1996), p.397, at p.398.
22. The opinion and the resolution have been reprinted in *ILM*, vol. 35 (1996), pp.1322-1334.

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding the differences of an economic, social, political or other nature.
>
> In particular, sovereign equality includes the following elements:
>
> (a) Each State enjoys the rights inherent in full sovereignty.
>
> (b) Each State has the duty to respect the personality of other States;
>
> (c) The territorial integrity and political independence of the State are invoilable.[23]

The principle of sovereign equality generates a range of operational rules. It obligates states to respect each other's sovereignty, each other's sovereign attributes, each other's political independence, each other's international obligations. It casts a duty on a state not to frustrate the lawful agreements and other relations between other states.

Indeed, the respect for each other's territorial integrity and other attributes of sovereignty encompasses a duty of a state not to transgress upon the domestic jurisdiction of other states. Within the framework of international law, a state's jurisdiction within its territory is absolute and exclusive. The exercise by a state of its rights to jurisdiction is generally justified in terms of the principles of territoriality and nationality, the protective principle and the principle of universality. State jurisdiction is not always in strict conformity with these principles, nor is each of these principles susceptible of application avoiding overlapping claims to jurisdiction. However, it is generally accepted that, save the principle of universality, a valid exercise of state jurisdiction based on any of the other principles must bear on matters, most closely related to, or having a direct, immediate and substantial nexus with the legitimate interests of a state, taking into account the legitimate interests of other states of the international community.[24]

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23. UN General Assembly Resolution 2625 (XXV) of 24 October 1970. For a study of the *travax préparatoires* of the resolution, see V.S. Mani, *Basic Principles of Modern International Law* (New Delhi, 1993). The International Court in the *Nicaragua* case noted that the Friendly Relations Declaration "set out principles which the General Assembly drclared to be the "basic principles" of international law" *ICJ Reports 1986*, p.14, at p.107.

24. See generally R.Y. Jennings, "Extra-territorial Jurisdiction and the United States Antitrust Laws", *BYIL*, vol.33 (1957), pp.146-175. For some of the Indian writings on the issue, see Lotika Sarkar, "The Proper Law of Crimes in International Law", *ICL*, vol.11 (1962), pp.446-470; M.K. Nawaz, "Criminal Jurisdiction in International Law", *IYIL*, vol. 1 (1952), pp. 210-217; C. Kesava Rao, "Civil Jurisdiction and International Law" *ibid*, pp. 218-228; P. Chandrasekhara Rao, *The Indian Constitution and International Law* (Delhi / The Hague, 1993), pp. 39-48.

As the US Department of State itself recognized in its letter of 27 September 1979 to the Senate Committee on the Judiciary:

> Even where there is a basis in international law for exercising jurisdiction, principles of comity often suggest that forbearance is appropriate. Under these principles, states are obliged to consider and weigh the legitimate interests of other states when taking action that could affect those interests, and should leave the regulation of conduct to the state with the primary interest. Thus our foreign partners expect that in general they have the right to regulate the climate for investment within their territories and to establish energy and competition policies for their own economies and firms.[25]

The abuse of the *Alco* doctrine, for claiming jurisdiction over "foreigners' foreign agreements" alleging *some* effects, even if mere repercussions, on the United States, as R.Y. Jennings has pointed out in the context of US anti-trust laws. "not only extends the US territorial jurisdiction beyond the limit covered by authority", but also amounts to "an attempt to export into other countries and to operate there what are after all peculiarly American political notions".[26] In the words of Phillip C. Jessup (himself a former Legal Adviser to the US Department of State) :

> The fundamental question is to determine which national authorities may deal effectively with which transnational situations—effectively in the sense that the authorities of other states will recognize that the exercise of authority is *reasonable* and will give effect to judgments rendered or *refrain from protests through the diplomatic channel.*[27]

Overarching of a national jurisdiction in total disregard of the legitimate interests and rightful claims to jurisdiction of other states is bound to raise serious international disputes. The European criticism of the 1982 US Regulation concerning Trade with USSR (re: the so-called Siberian Pipeline Affair) clearly revealed the seriously flawed jurisdictional bases of the US regulations in their presumed extra-territorial applicability. The European Community comments may be summarised as follows:

1. The Amercan measures infringed on the principle of territoriality since they purported to regulate the activities of persons of and in the European Community, not under the territorial competence of the United States.

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25. *AJIL*, vol.74 (1980), pp.179-183, quoted in D.W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources", *BYIL*, vol. 53 (1982), pp.1-26, at p.21.
26. Jennings, note 24, p.175.
27. Philip C. Jessup, *Transnational Law* (New York : 1956), p.70.

2. Companies incorporated in European Community could not be assimilated to US jurisdiction on the basis of a presumptive nationality thereby.
3. Nor could they be assimilated to US jurisdiction on the basis of presumed US origin of goods or technology.
4. The public policy of the European Community and of its member states cannot be replaced by the US public policy in respect of the Community's relationship with companies registered in the Community.
5. the protective principle of jurisdiction could not apply justifying US jurisdiction over European Companies, goods and technology merely on the US appreciation of its foreign policy or national security interests.
6. Nor could the "effects" doctrine apply, unless it was shown that the purported exports of the European Community to USSR for the Siberian gas pipeline had within the US "direct, forseable and substantial effects which are not merely undesirable" but at least had a direct effect on US trade.
7. The US had not respected the "balancing of interests" approach usually adopted by the US courts.
8. There was no provision for compensation for less resulting from compliance of the US law by foreign parties.[28]

These criticisms, *mutatis mutandis* are equally valid against the Helms-Burton and the D'Amto Acts.

With regard to the validity of extra-territoriality of a national law, the following propositions of international law may be made:

1. There is a presumption "that statutes are not intended to regulate matters outside the territory of the legislating state, at least to the extent that they may involve the conduct of aliens. This presumption ... cannot, however, be applied where the legislature's contrary intention is clear".[29]
2. "From the standpoint of international law, a national law is generally regarded as a fact with reference to which rules of international law have to be applied rather than as a rule to be applied on the international plane as a rule of law"...[30] Thus a national statute prescribing

28. *ILM*, vol.21 (1982), pp.892-904. The EU comments have been paraphazed by the present writer.
29. R.Y. Jennings and Arthur Watt (eds), *Oppenheim's International Law, vol. 1 Peace*, Part I (London, 9th edn., 1992), p.82.
30. *Ibid.*, p.83.

a rule contrary to international law "is simply one of the facts tending to establish the state's breach of its international obligations, and does not establish on the international plane the lawfulness of the state's action, however much it may do so on the national plane".[31]

3. On the international plane, the national law of a state is inapplicable "as against other states, whose rights and obligations are in the first place determined by international law and not by the national law of another state..."[32]
4. "(A) state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them, because its internal law was defective or contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirements..."[33]

The US Constitution does not expressly stipulate any territorial limitation on the powers of Congress.[34] However, it cannot be construed to authorize US conduct contrary to international law. Hence it is authoritatively recognized by the US *Restatement* that the exercise of extra-territorial jurisdiction is limited by international law.[35] There is no doubt that the extra-territorial application of the two American statutes militates against the territorial sovereignty of other states in that they seek to extend American jurisdiction over acts of foreigners and their states entirely outside the US territory.

The Helms-Burton Act seeks to violate the principle of sovereign equality in other respect too. It seeks to infringe on the right of every state (and its people) to determine its own economic and political system, without subjecting itself to the determination or certification of the US President.

The D'Amato Act seeks to abridge the permanent sovereignty of Iran and Libya over their natural resources, namely the right to develop their petroleum resources in a manner freely determined by these nations.[36] Ironically, however, the United States had itself confirmed at the United Nations the

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31. *Id.*,
32. *Ibid.*, p.84.
33. *Ibid.*, pp.84-85.
34. Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law", *AJIL*, vol.83 (1989), pp.880-93 at p.881.
35. See *Restatement (Third) of Foreign Relations Law of the United States* (St. Paul, 1987), Sections 402, 403.
36. The principle of permanent sovereignty over natural resources was affirmed by the UN General Assembly in its 1962 declaration; see Resoluion 1803 (XVII). It has since been incorporated in the International Covenants on Human Rights in 1966 — see the common Article 1 (2).

rights of a state of freely dispose of its natural resources, the rights "which were by definition sovereign" exercising them in the "natural course of events."[37]

2. Non-Intervention

In the *Nicaragua* case, the International Court of Justice observed that:

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of tresspass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.[38]

The Court recalled that when on an earlier occasion, in the *Corfu Channel* case, it had before it a claim of a state (the UK) to a right of intervention in order to secure evidence from the territory of another state (Albania) for submission to an international tribunal, the Court had then declared that

> The alleged right of intervention as a manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here: for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[39]

In respect of the issues raised in the *Nicaragua* case, the Court said: "The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the grounds offered as justification ... In fact ... the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rule of existing international law".[40] On the basis of evidence

37. Hargrov (US), UN Doc.A/Ac.125/SR.5,p15, quoted in Mani, note 23, p.156.
38. *The Case Concerning Military and Paramilitay Activities in and against Nicaragua* (Nicaragua vs. United States of America), *ICJ Reports 1986*, p.14, at p. 106.
39. *ICJ Reports 1949*, p.4 at p.35.
40. Note 38, p.109.

before it, the Court held in the *Nicaragua* case, *inter alia*, that the United States intended, by its conduct, to coerce the Government of Nicaragua in respect of matters in which each State is permitted by the principle of state sovereignty, to decide freely and that such conduct constituted "a clear breach of the principle of non-intervention".[41]

The relevant provisions of the principle of non-intervention embodied in the Friendly Relations Declaration are the following:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference of attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
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> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind....
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> Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another state.

Evidently, the two US laws authorise and require actions by the US authorities in contravention of many of the above provisions. As regards Cuba, the Helms-Burton Act seeks to provide what the ICJ declared illegal, namely the US support and assistance for Cuban dissidents against the government. It could further be argued that the sanctions and other acts required of the American authorities under the two enactments would amount to "use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."

3. Good Faith

The principle of good faith has been recognized by the 1970 Friendly Relations Declaration to be one of the "basic principles" of international law.[42] It has been described as a "fundamental principle of international law".[43] Good faith prescribes a condition beyond which the exercise of rights

41. *Ibid.*, p.124.
42. UN GA Resolution 2625 (XXV) of 24 October 1970, seventh principle.
43. G. Schwarzenberger, *A Manual of International Law* (London, 4th edn., 1967), pp. 44 and 148.

and performance of obligations cannot go. A failure to observe good faith constitutes "an abuse and hence a violation of international legal order".[44]

It is axiomatic that the principle of good faith conditions not only the performance of obligations, but the exercise of rights under all law, let alone international law. As a French saying goes: "Your right to swing your staff stops where my nose begins". The rights of independence of a state including the rights to exercise of authority in relation to persons and things within its domain, are equally subject to the principle of good faith. Thus dealing with the extent of powers of the customs authorities, the International Court rightly held:

> The power of making the evaluation rests with the Customs authorities, *but it is a power which must be exercised reasonably and in good faith.*[45]

In other words, reasonableness is the hallmark of good faith, even when a state exercises its rights.

The International Court has had occasions to examine the question of compatibility of exercise of domestic jurisdiction of a state with international law. In *the Anglo-Norwegian Fisheries* case, as already noted, the Court examined and upheld the legitimacy of a piece of Norwegian legislation delimiting the coastal fisheries zone taking into account the special circumstances of the Norwegian coast.[46] In the *Nottebohm* case, it held that for a nationality law to be valid in terms international law, it must conform to the rule of genuine link between the state conferring nationality and the individual on whom the nationality is conferred.[47] Much of the restrictions/ qualifications on the exercise of state sovereignty within its domestic jurisdiction flows from the principle of sovereign equality through the requirement that sovereign rights must be exercised in good faith, as its basis is the respect for each other's sovereignty. As the International Court emphasised in the *Corfu Channel* case, 'between independent States, respect for territorial sovereignty is an essential foundation of international relations".[48] Thus, "the first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not

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44. Delphech (Argentina), UN Doc.A/AC.125/SR.59, p.6 (Special Committee on Friendly Relations). For more on the *travaux préparatories* of the 1970 Friendly Relations Declaration, see Mani, note 23, pp.200-220.
45. *Rights of Nationals of the United States of America in Morocco, ICJ Reports 1952,* p.176, at 212.
46. See note 2.
47. *ICJ Reports 1985,* p 4, at p.23.
48. *ICJ Reports 1949,* p.4, at p.35.

exercise its power in any form in the territory of another State".[49]

The principle of good faith in this respect often manifests itself in concepts like estoppel, abuse of rights, equity and reasonableness.

While considering the item on "international liability for injurious consequences arising out of acts not prohibited by international law," the International Law Commission noted the "broad principle that States, even when undertaking acts that international law did not prohibit, had a duty to consider the interests of other States that might be affected".[50]

The Helms-Burton and D' Amato Acts are admittedly, directed against the essential sovereign attributes of Cuba, Libya and Iran. They also purport to play foul with the sovereign rights of third States and their nationals in their relations with the three target states. Evidently, the American legislature in enacting the laws, and the American President in signing them into statutes have clearly violated the *jus cogens* of good faith. Overarching of extra-territorial reach of a domestic statute beyond the generally recognised limits, *prima facie*, violates the norm of good faith. In terms of the *Anglo-Norwegian Fisheries* case,[51] the burden of proving the legality of the two 1996 statutes falls on the United States. Both the intrinsic and extrinsic evidence in relation to the statutes clearly points to US violation of good faith, and abuse of its legislative powers.

4. Freedom of Trade

Restrictive or unfair trade practices have always been censured as contrary to freedom of trade, the core norm of international trade law.

The General Agreement on Tariffs and Trade (GATT) 1948, now an integral part of the WTO agreements, seeks to provide for "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce". The general freedom of international trade under GATT is subject to two sets of exceptions, namely the General Exceptions in Article XX, and Security Exceptions in Article XXI. It is submitted that none of these exceptions could have saved the impugned US

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49. *S.S. Lotus, PCIJ Series A, No.10*, p.18.

50. *ILC Yearbook, 1980, vol.II, Part 2*, p.159. (However, the ILC seems to consider the item more in relation to *activities within* a state with a risk of causing transboundary harm to another state, largely influenced by considerations of environmental harm rather than all acts pursuant to exercise of rights of states under international law). The item deserves no such limitation. For an early recognition of this principle in the context of freedoms of the high seas, see what is now Article 87 (2) of the UN Convention on the Law of the Sea, 1982.

51. See note 2.

laws and action thereunder from being inconsistent with GATT. Article XXI (b) on Security Exceptions provides that nothing in the Agreement should be construed, *inter alia*, to preventing a contracting party from taking any action which it considers necessary for the protection of its essential security interests:

> (i) relating to fissionable materials or materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunitions and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations.

For at least three reasons, Article XXI (b) (ii) must be construed restrictively. First, an exception to a general rule must always be restrictively construed. Second, being part of a multilateral treaty which also provides a disputes settlement mechanism, any expression employed therein must have an internationally acceptable meaning or at least related to an internationally acceptable standard. Third, in the light of the *Nicaragua* ruling on the term "essential security interests" (referred to below): (a) the action taken by a state under the above provision (i.e. Article XXI (b) (ii) must be reasonable; (b) it must be its immediate and direct reaction to an action taken by the target state; and (c) it must not be discriminatory, selective or disproportionate. Indeed, non-proliferation or disarmament measures, to be internationally valid, must be based on a universal treaty under effective international control.[52] It may be noted that the 1994 General Agreement on Trade in Services (GATS) contains similar provisions in Article XIV *bis*. It also provides for an obligation to report to the Council for the Trade in Services, of WTO. Evidently, the criteria laid down by the International Court to determine justifiability of measures taken by a state to protect its "essential security interests" will apply with equal force in the context of GATS as well. The legitimacy or otherwise of a claim of exception would fall to be decided by the WTO disputes settlement procedures, as they are the only procedures, accepted by the members of the WTO to interpret and apply the

52. The eleventh paragraph of the formulation of the principle of prohibition of force contained in the 1970 Friendly Relations Declaration embodies the undertaking by states to "pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control...". See Resolution 2625 (XXV).

provisions of the WTO agreements.

An equally relevant question in the context of the principles of international trade law is whether, and if so under what circumstances, a state can interfere with a direct trade relationship between two other states. The freedom of trade principle does not brook such interferences. The above exceptions may not apply at all to such a situation, as they imply existence of trade relationship between a state claiming an exception and another state in relation to their mutual trade. The US enactments are flawed on this count as well.

B. The Law Relating to Peacetime Counter-Measures[53]

The concept of counter-measures, traditionally described as retorsion, implies the right of a victim state to resort to self-help against another state which has committed an internationally wrongful act against it. It occupies a twilight area between peace and armed conflict.

Under traditional international law—which did not recognise the concept of *jus cogens*—, self-help in the form of retorsion was part of the sanctions under international law. A state could thus pursue remedial/retaliatory action against another state in reply to the latter's unacceptable conduct, i.e. an illegal conduct on the part of the latter impacting on the former could justify a retaliatory action on the part of the former. Implicit in this situation was the right of a state to decide unilaterally whether another state's conduct was directed against it, whether that conduct was illegal, and whether it was of sufficient seriousness inviting and justifying the kind of retaliation by the former. The raw principle of reciprocity was in action without being conditioned by other civilized principles. Evidently, the traditional international relations had nothing to do with natural law principles such as *audi alteram partem* that no one can be a judge of his own cause and the principles of equity and proportionality, all of which stood violated, when the traditional law approved or atleast tolerated retorsion by unilateral action without subjecting it to objective limits. This led to frequent resort to retorsion and even armed intervention by powerful states on the flimsiest grounds. There was indeed no discernible boundary line between retorsion and intervention.

Modern international law has evolved a range of consensually accepted basic principles conditioning and inhibiting unilateral retaliatory actions by states. They include the principles of non-use of force, non-intervention, sovereign equality and peaceful settlement of disputes. The rationale of retorsion is the claim of the state launching retorsion that the target states

53. See generally Zoller, note 6; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, 1988).

unlawful conduct calls for retaliation. Its validity logically falls to be determined within the framework of the principle of peaceful settlement of disputes, as the validity of the claim of unlawful conduct must necessarily be determined pursuant to the peaceful settlement principle.

The International Court, while highlighting the importance of the principles of non-use of force and non-intervention, has indicated some limits to the so-called right to resort to counter-measures. In the *Corfu Channel* case, one of the issues was whether Britain had a right to send an armed mine sweeper forcibly to mine-sweep the Corful Channel (which fell within the territorial sea of Albania), in view of the fact that its men-of-war had been struck by mines in those waters. The Court had no hesitation in proclaiming that: "the alleged right of intervention as a misfestation of a policy of force, such as has, in the past, given rise to most serious abuses and *such as cannot, whatever be the present defects in international organization, find a place in international law*".[54] The Court did not approve of the kind of retaliatory action Britain resorted to in the instant case, "for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself".[55]

The *US Diplomatic and Consular Staff in Tehran* case involved two major issues relevant to the law of counter-measures. The first related to the Iranian defence that Iran's impugned conduct in respect of the US diplomatic and consular staff in Tehran was in response to the activities of the US diplomats and consular officers in Iran for more than 25 years involving continual interference in the internal affairs of Iran, exploitation of Iran and "numerous crimes" directed against the Iranian people. The Court did not accept the validity of this defence because "the diplomatic law itself (the 1961 Vienna Convention on Diplomatic Relations and the 1963 Convention on Consular Relations) provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[56] In other words, counter-measures are not justified in respect of a state conduct for which remedial/sanction measures are provided for in an applicable multilateral treaty.[56a]

The second issue, which arose in the same case, even as the Court was in the process of preparation of its judgment in the case, was the permissi-

54. Note 39.
55. *Id.*
56. *Ibid, ICJ Reports 1980*, p.3, para 83.
56a. In the *Gabcikovo-Nagymaros Project* case, ICJ rejected a Slovak justification of a unilateral act seeking approximate application of a 1977 treaty with Hungary as a counter-measure, partly for the reason that the act did not conform to the treaty provisions. See ICJ Judgment of 25 September 1997, paras 69, 71 & 78. See *this Journal* pp. 74ff.

bility of US incursion into Iran on 24-25 April 1980. Even though the Court appreciated the preoccupations of the US Government with respect to its nationals held hostage in its Tehran embassy for over five months, the Court felt bound to observe that "an operation undertaken in these circumstances (i.e. when the Court was at the thick of preparing its judgment), for whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations". The Court also recalled that in its Order 15 December 1979, it had indicated that "no action was to be taken by either party which might aggravate the tension between the two countries".[57] In other words, resort to counter-measures shall not frustrate the process of peaceful settlement of disputes. While pursuing peaceful settlement, parties to a dispute are obliged not to take any action (including counter-measures) which might aggravate the situation.

In the *Nicaragua* case, the International Court ruled that "while an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree cannot... produces any entitlement to take collective counter-measures involving the use of force". Wrongful acts not amounting to an armed attack "could only have justified proportionate counter-measures on the part of the State which has been the victim of these acts. ...They could not justify counter-measures taken by a third State".[58]

In the case concerning the *Air Services Agreement of 27 March 1946 between the United States of America and France,* the arbitration tribunal in the award of 9 December 1976 recognised the relevance of counter-measures in inter-state relations, even while a dispute settlement procedure was set in motion. The case related to an alleged breach of an obligation by France *vis-a-vis* the US, and the US counter-measures against France, both directly affecting the operation of bilateral air services. The tribunal observed : "If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter-measures".[59]

The tribunal further said; "It is generally agreed that all counter-measures must, in the first instance, have some digree of equivalence with the alleged breach; this is a well-known rule".[60] It recognised the potential of counter-measures to aggravate the dispute. Hence its counsel of wisdom:

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57. *Ibid.*, para 93, The issues of legality and responsibility, relating to the US action, the Court stressed, were not before it in that case.
58. *ICJ Reports 1986,* p.14, at p.127.
59. See Zoller, note 6, Appendix, p.138, at pp.166-167, para 81.
60. *Ibid.*, p.167, para 83. The tribunal used "equivalence" and "proportionality" interchangeably. They included not only the actual loss sustained but also "the importance of the positions of principle". *Id.*

Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resloving the dispute".[61]

Since 1979, the International Law Commission has been grappling with the concept of counter-measures in the context of state responsibility. In its 1994 Session, it provisionally adopted the following articles:

Article 11
Counter-measures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled to take counter-measures, that is subject to the conditions and restrictions set forth in articles 12, 13, and 14, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 6 to 10 *bis*.[62]

2. Where a counter-measure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 13
Proprtionality

Any counter-measure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14
Prohibited Counter-measures

An injured State shall not resort, by way of counter-measures, to:

(a) the threat of use of force as prohibited by the Charter of the United Nations:

(b) extreme economic or political coercion designed to endanger the territorial integrity and political independence of the State which has

61. *Ibid.*, p.168, para 91. See also ICJ ruling in *Gabcikovo-Nagymaros Project*, note 56a, para 87.

62. Art.6 is on Cessation of wrongful conduct, Art. 6 reparation; Art.10 satisfation, and Art. 10 *bis* guarantees of non-repitition.

committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

(e) any other conduct in contravention on a premptory norm of general international law.[63]

On the basis of the 1970 Friendly Relations Declaration and the above developments in international law, the following legal postulates may be made to determine the validity of unilateral counter-measures by states:-

1. Every state shall settle its international disputes with other states by peaceful means, in such a manner that international peace and security and justice are not endangered.
2. States shall accordingly seek *an early and just* settlement of disputes by *peaceful* means of their choice.
3. States parties to a dispute have the duty, in the event of failure to reach a solution by any one of the peaceful means, to continue to seek a settlement of the dispute by other mutually agreed peaceful means.
4. States parties to a dispute, as well as other states, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the Purposes and Principles of the UN Charter.[64]
5. Only on objective evidence of failure of all reasonable efforts at peaceful settlement of a dispute about the alleged wrongful conduct of a state, may the victim state (resorting state) resort to retaliatory measures (counter-measures) against the former (the target state) for satisfaction of an injury it sustained from the wrongful conduct of the former. Counter-measures shall not be resorted to without reasonable notice to the target state.
6. A state shall not resort to counter-measures against the target state —
   (a) if a remedial measure is prescribed in an applicable treaty or convention in respect of the alleged unlawful conduct, or
   (b) if a competent international organisation with disputes settlement functions is seized of the question, or
   (c) if access to a competent international organization with powers to decide on sanctions against the target state, is available to the

63. *ILC Yearbook 1994*, GAOR, 49th Sess., Supplement No. 10, UN Doc.A/49/10, Part II, pp.327 ff, at pp.365-366. Article 12 (conditions relating to resort to counter-measures) was deferred for further consideration — see *ibid.*, pp.365-366.

64. See the first four paragraphs of the principle of peaceful settlement of disputes formulated in the Declaration, UNGA Resolution 2625 (XXV) of 1970.

victim state.

7. Counter-measures resorted to shall be proportionate to the injury sustained by the resorting state.
8. Counter-measures shall be of a temporary duration and shall abate—
   (a) upon peaceful settlement of the dispute, or
   (b) upon satisfaction of the injury sustained by the resorting state, whichever occurs earlier.
9. In no case shall counter-measures adversely affect third states or their nationals.
10. Counter-measures shall not violate peremptory norms of international law. They shall not be unilaterally resorted to by a state in respect of an alleged violation of an international obligation *erga omnes* owed by the target state, whereby the resorting state has not sustained a proven injury.

How do the impunged US laws fare against these postulates? The Helms-Burton Act is based on the alleged need to seek 'justice' for American nationals whose assets in Cuba had been 'confiscated' since 1959 and for the shooting down of an American aircraft on 24 February 1996. It is further based on the Congressional 'findings' on Cuba's unlawful conduct in pursuing domestic policies which prompted exodus of Cuban refugees to the United States, and in harbouring fugitives from American justice. It is also based on the Congressional 'findings' that Cuba has been violating international norms relating to prohibition of subversion and export of terrorism, prohibition of international drug-trafficking, and promotion of human rights and democracy in Cuba. In other words, these are a mix of claims of injury to the United States as a state victim of the wrongful conduct of Cuba, and claims of violation of *erga omnes* obligations of Cuba, irrespective of whether or not the violations result/resulted in provable injury to the United States. In so far as the American claims relating to Cuban expropriation of American assets are concerned, they cannot be sought to be satisfied as against third states through the phantom concept of "trafficking" in the expropriated assets. The allegation of 'blackmail' and other illegal acts against the US and other states is too vague, and unspecific to form the basis for any counter-measures. The claims relating to the shooting down of the American aircraft should have been pursued within the framework of the UN Security Council/the ICAO Council.[65] It is not for the United States to sit in judgment over the alleged Cuban violations of *erga omnes* obligations, nor

65. See the Security Council Resolution 1067 of 26 July 1996, and the Security Council Presidential Statement of 27 Feb., 1996 at the 3635th meeting of the Council, UN Doc.S/PRST/1996/9 For these, see *IJIL*, vol. 37 (1997), pp. 767-68.

can counter-measures be used in lieu of international sanctions. At any rate, counter-measures directed against third parties are illegal. The Helms-Burton Act aims at isolating Cuba and heighting America's economic embargo of that country with a view to forcing a change in the latters social, economic and political system. The Act aslo aims at imposing on Cuba western democracy and western preceptions of human rights. These amount to violations of the principle of non-intervention".[66]

The D'Amato Act, in so far as it is directed against Libya, displays an element of counter-measures in that it seeks satisfaction of the American claims relating to the 1988 Pan Am explosion over Lockerbie, Scotland. However, the issue is before the UN Security Council and the International Court of Justice. Counter-measures are, *prima facie* not maintainable, when a dispute is before the competent international orgainzations and peaceful means of settlement have not been exhausted. Equally, it is for the Security Council and the ICAO Council to determine questions relating to the aviation capabilities of Libya: the US cannot impose its will through unilateral measures upon other states, including Libya.

In so far as the D'Amato Act targets Iran and third states in relation to Iran, it makes a mockery of the law relating to counter-measures and the peremptory norms of international law. The only, albeit half-hearted, justifications obliquly invoked have been (a) the need to punish all those Iranian nationals who were involved in holding US diplomatic and consular officers in the American embassy in Tehran in 1979-80, and (b) the national security interests of the US. One would have thought that the Algiers Agreement brokered by Algeria in 1980 provided for settlement of all disputes between the US and Iran. The Act also has the potential to violate the principles of diplomatic law enshrined in the 1961 and 1963 Conventions, as it mandates presidential action to seek reduction of Iranian diplomatic staff/their expulsion in/from third countries.

With respect to both Libya and Iran, the D'Amato Act seeks to apply sanctions even against third parties for alleged augmentation of their capabilities in relation to weapons of mass destruction, and for their participation in promotion of international terrorism. Should these allegations be proved, they may relate to issues of international obligations *erga omnes*. It is not for the US to sit in judgment and punish the "culprits", in utter disregard of the principles of natural justice or the due process of law (of American fame !).

66. "A State's domestic policy", said the International Court in the *Nicaragua* case, "falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems". *ICJ Reports 1986*, p.14, at p.131. See also pp.108 and 133.

Finally, D'Amato Act seeks to strike at the sovereign right of both Libya and Iran to develop their petroleum resources. As already seen, this is a clear violation of the principle of permanent sovereignty over natural resources. On this count too, the D'Amato Act sets in motion patently illegal counter measures as they contravene many a peremptory norm of international law.

C. Unilateral Imposition of 'International' Sanctions[67]

The validity of the impugned American legislation must also be examined in terms of the concept of international sanctions.

The concept of international sanctions assume the existence of an international community, a general identification and recognition of certain core values of that community. Ideally, as in the domestic communities, the international community must have its own organs to assist in recognition of these core-values, and to bring to book their violators.

International relations, in their present stage of development, do recognise the existence of an international community primarily organised through states as its units. They also recognise the existence of certain core-values in which the international community believes and which it strives to achieve. Often global international organisations are helpful in identifying/midwifing the emergence of these core-values. However, they are ill-equipped, in terms of both legal or constitutional competence and physical resources, to seek total compliance of states with these core values or to take penal action against the recalcitrant.

A wrongful act of a state may involve : (a) a violation of an obligation which owes another state, or (b) a violation of an obligation which it owes another state and which is at once an obligation *erga omnes*; or (c) a violation of an obligation *erga omnes*. The *jus standi* of the international community organs in relation to (b) and (c) is most immediate, i.e. upon occurrence of the wrongful act. In relation to (c) the role of these organs is exclusive. In relation to (b), it is preponderant, i.e. once the community organs step in, the so-called victim state should cease and desist from taking unilateral action against the alleged recalcitrant. As regards (a), a wronged state may take unilateral action in retaliation within the framework of international law (as discussed in the preceeding sections), until a community organ steps in, in the interests of international peace and security.

The International Law Commission supports the view that the international community would have to turn towards:

67. For a recent writing on this topic, see Margert Doxey, 'International Sanction in Recent State Practice; Trends and Problems", in Bin Cheng and E.D. Brown (eds), *Contemporary Problems of International Law* (London, 1988), pp.53-69.

can counter-measures be used in lieu of international sanctions. At any rate, counter-measures directed against third parties are illegal. The Helms-Burton Act aims at isolating Cuba and heighting America's economic embargo of that country with a view to forcing a change in the latters social, economic and political system. The Act aslo aims at imposing on Cuba western democracy and western preceptions of human rights. These amount to violations of the principle of non-intervention".[66]

The D'Amato Act, in so far as it is directed against Libya, displays an element of counter-measures in that it seeks satisfaction of the American claims relating to the 1988 Pan Am explosion over Lockerbie, Scotland. However, the issue is before the UN Security Council and the International Court of Justice. Counter-measures are, *prima facie* not maintainable, when a dispute is before the competent international orgainzations and peaceful means of settlement have not been exhausted. Equally, it is for the Security Council and the ICAO Council to determine questions relating to the aviation capabilities of Libya: the US cannot impose its will through unilateral measures upon other states, including Libya.

In so far as the D'Amato Act targets Iran and third states in relation to Iran, it makes a mockery of the law relating to counter-measures and the peremptory norms of international law. The only, albeit half-hearted, justifications obliquly invoked have been (a) the need to punish all those Iranian nationals who were involved in holding US diplomatic and consular officers in the American embassy in Tehran in 1979-80, and (b) the national security interests of the US. One would have thought that the Algiers Agreement brokered by Algeria in 1980 provided for settlement of all disputes between the US and Iran. The Act also has the potential to violate the principles of diplomatic law enshrined in the 1961 and 1963 Conventions, as it mandates presidential action to seek reduction of Iranian diplomatic staff/their expulsion in/from third countries.

With respect to both Libya and Iran, the D'Amato Act seeks to apply sanctions even against third parties for alleged augmentation of their capabilities in relation to weapons of mass destruction, and for their participation in promotion of international terrorism. Should these allegations be proved, they may relate to issues of international obligations *erga omnes*. It is not for the US to sit in judgment and punish the "culprits", in utter disregard of the principles of natural justice or the due process of law (of American fame !).

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Finally, D'Amato Act seeks to strike at the sovereign right of both Libya and Iran to develop their petroleum resources. As already seen, this is a clear violation of the principle of permanent sovereignty over natural resources. On this count too, the D'Amato Act sets in motion patently illegal counter measures as they contravene many a peremptory norm of international law.

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> a system which vests in international institutions, rather than States, exclusive responsibility, first for determining the existence of the breach of an obligation of basic importance to the international community as a whole, and, thereafter for deciding what measures are to be taken in response and how they are implemented.[68]

Primacy of international organisation in respect of imposition of community sanctions against a recalcitrant state is largely a function of interaction between law and politics. Yet the legality and legitimacy of the sanctions are determined by law[69] and their consensual acceptance by the international community.

While the sanctions mandate of the United Nations is broad enough to encompass matters relating to international peace and security, yet it is not co-terminous with violations of *all* obligations. *Erga omnes* obligations fall within the sanctions competence of the UN Security Council, only if they amount to a threat to the peace, breach of the peace or an act of aggression, in terms of Article 39 of the UN Charter. The sanctions decided by the Security Council must then conform to Article 39 perception of an international situation, and other Charter provisions (such as Articles 24 and 25) conditioning the exercise of the Council's powers.

The impugned US statutes cite a number of alleged violations of *erga omnes* obligations by Cuba, Libya and Iran — international drug trafficking, subversive activities, international terrorism, violation of human rights, violation of the law of asylum, and acquisition of mass destruction weapons capabilities. The D'Amato Act also alleges non-fulfilment by Libya of the 1992 and 1993 Security Council resolutions. If these alleged violations of obligations *erga omnes* related to international peace and security in the context in which they are alleged to have occurred, it will be for the UN Security Council to determine (a) the nature of these obligations and specificity of alleged violations, (b) whether violations have occurred, and (c) if so, what community action should be taken.

It is not for the United States unilaterally to decide on these questions, and impose sanctions, through extra-territorial application of its domestic laws, not only upon Cuba, Iran and Libya, but also upon third states and their nationals transacting with these three states. In other words, when an international organ exists representing the International community, resort to imposition of unilateral sanctions for alleged violation of obligations *erga omnes* is impermissible. Modern international law does not countenance a state, however mighty, to be the self-appointed international policeman.

68. *ILC Yearbook 1979*, vol.II, Part 2, p.119, para 12 (Rapporteur Roberto Ago).
69. More on this see, V.S. Mani, "The Role of Law and Legal Considerations in the Functioning of the United nations, *IJIL*, vol. 35 (1995), pp. 91-118.

Wantonness in the use of legislative power by the US Congress reaches its zenith (or nadir?) as the Helms-Burton Act defines "aggression" in terms of (a) completion of construction of a nuclear facility and its operation, and (b) pursuit of policies leading to influx of refugees into the US![70]

A word about imposition of Western form of democracy in Cuba, an objective of the Helms-Burton Act. As noted already, the International Court ruled in the *Nicaragua* case that outside intervention to support the dissidents in a state with a view to changing its ideology or political system is impermissible under international law. Hence a unilateral "humanitarian" intervention allegedly for the protection of human rights by the US in Cuba will be violative of international law.[71]

Nor can unilateral sanctions for promotion of the objectives of non-proliferation of armament, and disarmament, in the security interests of a state, be legally tenable.[72] The legality of a unilateral act of a state in furtherance of its "essential security interests" did come up in the *Nicaragua* case, in which the International Court dealt with the contention of the United States that the militarization of Nicaragua was excessive and such as to prove its aggressive intent. This indeed was one of the justifications the United States gave for its activities against Nicaragua. The Court found this contention to relate to both domestic policy and foreign policy of Nicaragua. It remarked:

> It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, *since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise*, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.[73]

So long as states have not lived upto their undertaking to negotiate in good faith a universal treaty of disarmament with effective international control, unilateralism in discriminatory arms control regimes is unacceptable.

Finally, one of the side-shows of the D'Amato Act is its partial claim to legitimacy traceable to the international sanctions imposed by the UN

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70. Read this against the Definition of Aggression, UNGA Resolution 3314 (XXIX) of 1974.

71. For a doctrinal analysis of the concept, in the context of promotion of human rights, see V.S. Mani, "Humanitarian Intervention and International Law", *IJIL*, vol.33 (1993), pp.1-25.

72. For more on this see Mani, note 8 in the context of the MTCR.

73. *ICJ Reports 1986*, p.14 at p.135, emphasis added.

Security Council.[73] While one may have reservations about the legality of the Libyan sanctions of the Security Council, the D'Amato Act raises a further question: Can a member state on its own take unilateral action professedly for the purpose of enforcing Security Council sanctions, without a specific authorisation by the Council? That indeed amounts to a state taking the law in its own hands.

IV. CONCLUSION

The above discussion leads to the irresistible conclusion that the unilateral imposition of sanctions through extra-territorial application of national laws, such as that attempted by the Helms-Burton Act and the D'Amato Act runs contrary to international law, and the legislation is seriously flawed. The founders of the US Constitution, the eminent men who successfully led a revolution against the British colonialism and won for their country the precious rights of self-determination, would not have visualised the extent to which and the manner in which the legislative and the executive powers of their country would ever be abused in pursuit of interventionist policies they had themselves fought against. They never anticipated that the future American law-makers and presidents would engage in such an exercise.

The *Alco* ruling endorsing the "effects" doctrine appears to have emboldened the US legislative draftsmen to continue drafting/legislation extending the "long arm" jurisdiction of the American authorities to foreign soil, in the pretext of even the slightest claim of remotely perceived effects on the US. The post-Second World War expansion of the US transnational corporations to Europe and other parts of the world, coupled with the Cold War, provided conditions congenial for such extension of "long arm" jurisdiction. If the former situation reflected the concern of the US to retain control over US transnationals and make them financially accountable to the US department of internal revenue, the Cold War was an ideological war, a war between two political and economic systems contending for world domination. The latter, particularly, was rife with acts of retorsion, such as embargoes and boycotts. The European states reacted to the US "long arm" jurisdiction only when their trade or other economic interests were threatened to be adversely affected.

The 1980's added another dimension to the claims of "long arm" jurisdiction, when the United States and Europe formed oligopolies in areas

74. On issues of legality of these, see Judge Mohamad Bedjaoui, *Nouvel ordre Mondial et Controle de la légalité des Actes du Conseil de Sécurité* (Bruxelles, 1994) and V.S. Mani, "Aviation Security, International Terrorism and the Law", *IJIL*, vol.32 (1992), pp.1-59, at pp.53-57.

of high technology. The dual use of such technology gave them a facade of high morality — the alleged need to prevent proliferation of weapons of mass destruction and their delivery systems. These oligopolies were aimed to prevent transfer of high technology outside the developed world. The US enacted the National Defense Authorisation Act 1991 to strengthen the high technology oligopolies; it hit hard countries like India, even though transaction in question related to a "foreigners' foreign agreement", (in Jennings' language), and had nothing to do with armaments. The Europeans did not protest then, as they were not affected adversely by the American law. Indeed, they were part of the space oligopoly sought to be protected by the US law: This was the beginning of an anti-Third World facet of the US "long arm" jurisdiction, a facet which grew stronger since the early 1990's. This has now become a *sine qua non* of the so-called "New World Order", now dominated by the one-and-only super power. One looks at the Helms-Burton Act and the D'Amato Act against this backdrop.

These two US laws betray a contempt for international relations based on rule of law, a contempt for international organisation. They reflect an arrogance of power, and an assumption that the US Congress may legislate for the entire world — indeed, in disregard of democracy and fairplay in international relations, the lofty principles which Americans hold so dear for themselves. Given this trend, there is more of the US "long arm" jurisdiction to come, and much more of trying times for the Third World.